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JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 25, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

RE: Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992

Development of Competition and Diversity of Video Programming Distribution and Carriage

MM Docket No. 92-265

Dear Ms. Searcy:

Transmitted herewith, on behalf of the Community Antenna Television Association, is an original and ten copies of its Comments in the above referenced matter.

Please note that five of the enclosed copies are for distribution to the Commissioners. Should you have any questions regarding this filing, please contact the undersigned.

Sincerely,

Mark J. Palchick

MJP/mcl
Enclosure
cc: William H. Johnson, MMB, FCC
Ronald Parver, MMB, FCC
James R. Coltharp, MMB, FCC
Diane L. Hofbauer, OGC, FCC

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

Comments of the Community Antenna Television Association

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Comments of the Community Antenna Television Association

The Community Antenna Television Association ("CATA"), by its attorneys, respectfully submits its comments in the above-captioned notice of proposed rulemaking.

CATA is one of the principal trade associations representing cable television operators throughout the United States. The FCC's implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (PUB. L. NO. 102-385, 106 Stat. 1992) ("1992 Cable Act"), will have a direct effect on CATA's member cable television operators and their ability to provide cable television services in rural and other areas not currently able to receive multi-channel video programming and their ability to compete in an increasingly competitive environment for multi-channel video programming distributors.

CATA and its members have found that the vertical integration of cable television operators and video programming suppliers has provided a very positive benefit to the public. As a preliminary matter, therefore, CATA asks that the Commission honor the mandate of Section 19 of the 1992 Cable Act and take no action which will adversely affect the development of new video programming. However, many of CATA's member operators, who tend to be smaller operators in rural areas, have found that certain of the practices of certain video programming suppliers, whether integrated or not, result in unfair competition or unfair or deceptive acts or practices, the purpose or effect of which has been to hinder significantly (and in some instances to prevent) cable television operators from providing satellite cable programming and satellite broadcast programming to their subscribers at reasonable costs.

Vertical integration has brought real benefits to consumers and to diversity in media. However, some video programmers that hold predominant market positions have used that power to unfairly level excessive prices and discriminatory terms upon smaller cable operators. CATA's experience has been, in these instances, that the largest cable operators tend to pay for these services at or near competitive market rates. However, the smaller operators are then often forced to pay super-competitive rates to these services. Accordingly, CATA respectfully requests that the Commission use the authority granted to it by Section 19 of the 1992 Cable Act to reform the super-competitive prices that smaller operators must pay, unless the programmer can justify its higher prices and discriminatory terms pursuant to §§ 628(c)(2)(B)(i)-(iii).

A. <u>Statutory Requirement.</u>

Section 19 of the 1992 Cable Act provides at new Section 628 in pertinent part that:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purposes or effect of which is to hinder significantly, or to prevent any multi-channel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[1]

At Section 628(c)(2)(b), the FCC is required to adopt as <u>minimum regulations</u> rules which "prohibit discrimination . . . in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators or other multi-channel video programming distributors, ..."

Section 19 of the 1992 Cable Act gives to the FCC the right, the power, and indeed, the obligation to reform programming contracts between vertically integrated program suppliers and multichannel video distributors when the price, terms, or conditions of a program contract discriminate against a multichannel video distributor in a manner that results in an adverse effect on competition or artificially inflates the price that subscribers to the multichannel video distributors must pay to

---

[1]Section 628(b).

receive service. Section 19 of the 1992 Cable Act clearly recognizes that vertically integrated program suppliers have significant market power. This, CATA would note is also true with all of the larger program suppliers as they relate to smaller operators. Section 19 further recognizes that this significant market power does not automatically either promote competition or automatically restrict competition and diversity. The ready market that the vertically integrated programmer has for its product allows the creation of new video product with a significantly lower risk than if access to those markets was not so open. Thus, new programs have been created that are of great benefit to the public interest, convenience and necessity. It has not been CATA's experience that the cable operator owners of these program services demand or pay below market rates for the right to redistribute these programs. Such a result would be counter-intuitive as to their interest in maximizing the return on their investment in these program services.

However, it is the price, terms, and conditions imposed on multichannel video distributors who lack market power, such as smaller cable operators, that can be and often are discriminatory and anti-competitive. The smaller operators are placed in the position of having the economic necessity of acquiring these products to meet the demands of their customers, because the vast majority of surrounding systems carry these products. In many instances, an operator that fails to carry one of these programming services which has achieved marker power, or proposes to drop such a service from its line up, faces intense pressure from its franchising authority. With the franchise authorities having increased control over rates charged by the cable operator, this pressure to carry certain programming services will be even more acute. The market saturation of these services also makes it very difficult for an operator with limited channel capacity to launch a new, less prominent, service instead of the more ubiquitous service. All of this intensifies the need for operators to carry these services or face economic sanctions of denied rate increases and or denied franchise renewals.

Accordingly, the program services with market power are able to extract prices from the smaller operators that are super-competitive and to impose terms and conditions that add to the programmers' bottom line and increases cost to consumers without concomitant economic benefit. For example, smaller operators typically pay a premium of greater than 20% to carry program services with market power. Examples of discriminatory terms and conditions that program services with predominant market shares impose on smaller operators include:

1. Some program suppliers, such as MTV Networks and Turner Programming services, place conditions in their contracts that provide strong disincentives for an operator to carry less than the full panoply of their services. MTV Networks' contract is written so that an operator that does not carry the rock music video service of MTV must pay confiscatory rates to carry the children-oriented

programming of Nickelodeon. An operator that wishes to carry CNN but not CNN Headline News and WTBS loses one minute per hour of local ad avails.

2. Program suppliers heavily penalize operators that do not carry the service on the lowest tier of available programming.

3. Program suppliers, such as CNN and ESPN, force operators to pay for the CNN and ESPN service based on the total number of subscribers the operator has rather than the number of subscribers that receive CNN and ESPN. Thus, an operator with a basic broadcast tier and a satellite tier must pay CNN and ESPN for the subscribers that only receive the broadcast tier even though they do not receive ESPN and CNN.

4. Program suppliers require that operators carry their service only on VHF channels to the detriment of other services.

CATA and its member operators have found that in some instances these discriminatory prices, terms, and conditions may be necessary to promote diversity or may be justified by unique market considerations. However, an operator that is subject to these discriminatory terms must be permitted to bring a complaint before the FCC pursuant to Sections 628(d)-(f). The complainant's initial standard of proof should be limited to proof that the discriminatory conditions exist or are contained in the operators program affiliation agreement. Upon the filing of the complaint, the program vendor should then be required to supply evidence that the price, terms and conditions at issue are either uniform throughout all multichannel program distributors or that the price, terms and conditions:

> Impose reasonable requirements for credit-worthiness, offering of service, and financial stability and standards regarding character and technical quality; and
>
> Take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission; or
>
> Take into account economies of scale, cost savings or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor.

To the extent that the program supplier cannot meet the above showing, the FCC should reform the program contract. Moreover, in evaluating the complaint the FCC must recognize that these discriminatory price terms and conditions place a significant upward pressure on the prices the subscribers to these systems pay for service. Congress has already determined that these contracts can impede the development of delivery systems to the rural and underserved areas of the country and restrict the entry of new program distributors.

B. Standards for Review.

The Commission should review each complaint with the burden of proof on the program supplier to show that the prices, terms and conditions challenged are consistent with the exceptions contained in Section 628(c)(B)(i) through (iii). It is crucial that if a cable operator can establish the apparent existence of discriminatory prices, terms or conditions, that the burden of proof then shifts to the program supplier. The very nature of the program agreements prevent operators from aggregating data on how other operators are treated. As such, the sole source of information to show the reasonableness of various prices, terms and conditions lies with the program supplier.

Conclusion.

For the most part, the agreements between vertically integrated program suppliers and the cable operators that have an attributable interest in that service have served to foster competition and the development of a diverse and multi-faceted medium. However, the small, independent cable operators, many of which operate in rural segments of this country, are at a crucial crossroads. They face competition from other multi-channel video distributors, DBS, over-the-air broadcasting, and video rentals. They typically operate in markets that are extremely price sensitive so that their ability to raise rates to accommodate increasing costs of programming is severely restricted. Because of their limited access to capital and the increased costs of operation that they must face, these small entrepreneurs are under constant pressure to sell out to the large vertically and horizontally integrated operators in order to achieve the market leverage necessary to negotiate with the Program Suppliers on an equal basis and thus achieve fair prices for their subscribers. It is, however, these small, independent operators that have been the pioneers in wiring the unserved areas of America.

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By proceeding to act based on complaints satisfactorily showing discriminatory terms, the FCC will promote the intent of Section 19 of the 1992 Cable Act while not restricting the development of new services. However, it must also be able to reform those contracts which unfairly use a programmer's market power to discriminate against small cable operators. Finally, it is imperative that the Commission realize that CATA's experience indicates that it is not that the integrated cable operators are paying too little for their service, but rather that smaller operators are forced to pay above-market rates because of their lack of market power.

Respectfully submitted,

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